UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

WAUSAU BUSINESS INSURANCE CO.,

Plaintiff,

Case No. C-2-00-297

v.

MARJORIE J. CHIDESTER,

Defendant.

OPINION AND ORDER

This matter is before the Court on Plaintiff's motion for summary judgment and Defendant's motion for partial summary judgment pursuant to Federal Rule of Civil Procedure ("Rule") 56. (Docs. # 12, 13.) Plaintiff Wausau Business Insurance Company ("Wausau") brought this action seeking a declaratory judgment to resolve its dispute with Defendant Marjorie Chidester regarding a commercial automobile insurance policy (the "Wausau policy") that Wausau issued to the Zanesville City School District. Marjorie Chidester was an employee of Zanesville School District and contends that she is covered as an "insured" under the Wausau policy. The facts of this case are not in dispute. Rather, resolution of this case turns upon this Court's interpretation of the Wausau policy in accordance with Ohio law. For the reasons set forth below, the Court **DENIES** Wausau's motion for summary

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judgment and **GRANTS** Marjorie Chidester's motion for partial summary judgment.

I. FACTS

The parties agree to the following facts. On June 15, 1998, Marjorie Chidester was injured when her vehicle collided with another vehicle on Interstate 77 in West Virginia. (Doc. # 1 at 2.) At the time of the accident, she and her husband were on vacation and were driving in their personal automobile, a Nissan Sentra. (Id.) The collision was the fault of the other driver, Brian Dunn, who had lost control of his car thereby crashing into the Chidesters. (Id. at 3.) Brian Dunn maintained automobile liability insurance coverage up to $100,000 per person. (Id.) Marjorie Chidester settled her claims against Brian Dunn for $100,000, the full amount of his coverage. (Id.) However, she claims that the cost of her injuries exceeded and continue to exceed the amount under Dunn's policy. (Id.)

At the time of Marjorie Chidester's accident, she was an employee of the Zanesville City School District ("Zanesville"). (Id. at 2.) The Zanesville Board of Education purchased insurance coverage from Wausau, the result of which is the Wausau policy. (Id.) Chidester claims that in accordance with the Ohio Supreme Court's decision in Scott-Pontzer v.

Liberty Mutual Ins. Co., 85 Ohio St.3d 660 (1999) and its progeny, she is an "insured" under the Wausau policy. (Id. at 3.) Thus, she moves for partial summary judgment finding that she is an insured and is entitled to the policy's underinsured motorist coverage. (Doc. # 13.) On the other hand, Wausau seeks summary judgment arguing that Ohio statutory law precludes a board of education from purchasing insurance coverage for an accident that occurs outside the scope of employment with the school district. (Doc. # 12.)

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), a court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Essentially, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). However, "[c]redibility determinations, the weighing of

the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson, 477 U.S. at 255. That is, the Court must believe the evidence of the non-moving party and draw all justifiable inferences in his favor. See id. It is the moving party who has the burden of establishing that there is no genuine issue of material fact. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). The question the Court must answer is "whether reasonable jurors could find by a preponderance of the evidence that the [non-movant party] is entitled to a verdict. . . ." Anderson, 477 U.S. at 252; see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The Supreme Court has held that the standard for summary judgment "mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a). . . ." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986). That standard is that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id. This is true where, for instance, the dispute turns only on a legal question and the moving party must prevail as a matter of law even if the court were to resolve all factual disputes in favor of the non-moving party. See Ross v. Franzen, 777 F.2d 1216, 1222 (7th Cir. 1985). It is with these standards

in mind that the instant motions must be decided.

III. ANALYSIS

This case is before the Court based upon diversity jurisdiction. As such, "where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in federal court should be substantially the same . . . as it would be if tried in a State court." Ferens v. John Deere Co., 494 U.S. 516, 524 (1990) (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)). Accordingly, whether this Court agrees or disagrees with the Ohio Supreme Court's interpretation in Scott-Pontzer of an insurance policy identical to the one in this case is of no consequence. This Court is obligated to follow the substantive law of the State.

A. *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*

Scott-Pontzer involved a commercial automobile insurance policy issued to a corporation, Superior Dairy, Inc., by Liberty Mutual Fire Insurance Company. See Scott-Pontzer, 85 Ohio St.3d at 661. The plaintiff, Kathryn Scott-Pontzer, asserted a right to underinsured motorist coverage under the Liberty Mutual policy after her husband, an employee of Superior

Dairy, died in an automobile accident. See id. The Liberty Mutual policy defined the insured as "you" and "if you are an individual, any family member." Id. at 663-64. Liberty Mutual argued that "you" referred only to the named insured, Superior Dairy, and not to Superior Dairy's employees including plaintiff's husband. See id. at 664. However, the Ohio Supreme Court found the term "you" to be subject to varying interpretations. Id. The Court stated that "[i]t would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle." Id. Thus, in the face of ambiguous insurance policy language, the Court "construed the language most favorably to the insured" and found that the plaintiff's husband was an insured under his employer's policy. Id. at 665.

Upon concluding that the plaintiff's husband was an "insured" under the Liberty Mutual policy, the Court turned to the question of whether he would still be entitled to coverage despite the fact that he was not acting within the scope of his employment at Superior Dairy when he was killed in the automobile accident. See id. at 665-66. The Court noted that the Liberty Mutual policy did not contain any language which made coverage contingent upon employees acting within the scope of their

employment. See id. Quoting a previous decision, the Court stated that "'[in] the construction of insurance contracts, where exceptions, qualifications or exemptions are introduced into an insurance contact, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.'" Id. (quoting King v. Nationwide Ins. Co., 35 Ohio St.3d 208, 214 (1988)(citation omitted). Accordingly, the Ohio Supreme Court held that in the absence of contract language restricting coverage to employees who were acting within the scope of their employment, no such restriction would be read into the policy. See id. Thus, the plaintiff was entitled to the underinsured motorist benefits under the Liberty Mutual policy purchased by her husband's employer.

B. The Instant Case

With one exception, the instant case is factually identical to Scott-Pontzer. Like the husband in Scott-Pontzer, Marjorie Chidester was employed by an entity that owned a commercial automobile insurance policy at the time she was injured in an accident. That policy, the Wausau policy, defines an "insured" using the exact same language as the Liberty Mutual policy in Scott-Pontzer. Therefore, the term "you" in the Wausau

policy is equally ambiguous and must be construed to include Marjorie Chidester as an insured. Furthermore, like the Liberty Mutual policy, the Wausau policy does not restrict coverage only to those employees who were acting within the scope of their employment at the time of the accident. Indeed, the only distinguishing fact between Scott-Pontzer and the instant case is that the entity which purchased the insurance policy in Scott-Pontzer was a private corporation, whereas the entity which purchased the Wausau policy was the Zanesville Board of Education. It is this distinction upon which Wausau relies in arguing that Scott-Pontzer does not apply to this case.

1. Wausau's Position

Wausau concedes that, like the corporation in Scott-Pontzer, the Zanesville Board of Education is an entity that "cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle." Scott-Pontzer, 85 Ohio St.3d at 664. Thus, the Ohio Supreme Court's conclusion that an entity could only have purchased underinsured motorist coverage for the benefit of its employees would apply to the Zanesville board. In addition, Wausau recognizes that like the insurance policy in Scott-Pontzer, the Wausau policy does not contain any language restricting coverage to accidents occurring within the scope of

employment. Nevertheless, Plaintiff argues that the Zanesville board did not intend to contract for insurance coverage as expansive as that in Scott-Pontzer because the board does not have the authority to do so, and even if the board had intended to provide such coverage, the policy would be void based upon the board's *ultra vires* act. Indeed, "Ohio boards of education are purely creations of statute. [Their] authority to act is derived from and strictly limited to powers that are clearly and expressly granted to them by statute, or clearly therefrom implied by necessity." Empire Gas Corp. v. Westerville Bd. of Edu., 102 Ohio App.3d 613, 616 (10th Dist. 1999) If a board of education exceeds its statutory authority, its actions will be void. See id.

Wausau refers to various Ohio Revised Code sections in support of its argument that the Wausau policy was not intended to cover accidents occurring outside the scope of employment because a school board does not have the statutory authority to contract for that type of insurance coverage. For example, under O.R.C. § 9.83, a board of education may insure its employees against injury, death or loss arising out of their operation of an automobile "while engaged in the course of their employment or official responsibilities for the state or the political subdivision." O.R.C. § 9.83 (Supp. 1999). In addition, under

O.R.C. § 3313.201, a board of education may purchase liability insurance only for motor vehicles "owned and operated by the school district." O.R.C. § 3313.201 (1999). Furthermore, under § 3327.09, a board must purchase liability insurance limited to benefit "its employees who operate a school bus, motor van, or other vehicle used in the transportation of school children." O.R.C. § 3327.09 (1999). In this case, Marjorie Chidester was not transporting children, driving a car owned by the school district, or even driving in the course of her employment at the time of the accident. Wausau argues that this Court should not apply Scott-Pontzer to the circumstances of this case because Ohio law prevents a school board from contracting for the type of broad insurance coverage found to exist in Scott-Pontzer.

2. Chidester's Position

Marjorie Chidester contends that Wausau may not escape the language of its policy by arguing that the Zanesville Board of Education lacked the statutory authority to purchase that policy. According to Chidester, the scope of the board's authority to contract for insurance is irrelevant because under Scott-Pontzer, insurance companies are bound to the strict terms of the policies they draft. Indeed, the Ohio Supreme Court declared that:

> We recognize that insurers can draft policy language that provides varying arrays of coverage to any number of individuals. However, in drafting contracts of insurance, insurers must do so with language that is clear and unambiguous and that comports with the requirements of the law. Courts universally hold that policies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretation, will be construed most favorably to the insured.

Scott-Pontzer, 85 Ohio St.3d at 664-65 (citations omitted). Here, it is clear that Wausau used its standard commercial automobile insurance form in contracting with the Zanesville school board. Accordingly, Chidester argues that Wausau is accountable for the language included in or excluded from the policy regardless of whether the result is a policy for which Zanesville could not have legitimately contracted.

3. The Court's Decision

This Court agrees with Chidester's position that Scott-Pontzer applies to the facts of this case. Even assuming that the Zanesville Board of Education lacks the statutory authority to purchase insurance coverage for accidents occurring outside the scope of employment, Wausau is nevertheless accountable for the language in the policy it drafted. Under Scott-Pontzer, the language in the Wausau policy entitles Marjorie Chidester to

underinsured motorist coverage.

This Court may have decided not to follow Scott-Pontzer on public policy grounds if doing so would affect the public funds of the Zanesville City School District. As evident under O.R.C. § 5705.412, the State is concerned with school districts entering into contracts to the extent that they may compromise their ability to meet the educational needs of their district. O.R.C. § 5705.412 (Supp. 1999). Here, that is not a concern. The Zanesville Board of Education paid Wausau a premium of $17,426 for the policy in October of 1997. The only issue in this case is Wausau's obligation to provide coverage to Marjorie Chidester under that policy. Holding Wausau accountable to the strict terms of a policy it drafted does not translate into a violation of state statutory law. Wausau may not use the statutes cited above as a shield against its sloppy policy language, which happens to permit broader coverage than Wausau intended to provide.

Finally, Wausau argues that Marjorie Chidester is not entitled to underinsured motorist coverage under the policy because she was not driving a "covered" automobile at the time of the accident. However, "underinsured motorist coverage . . . was designed . . . to protect persons, not vehicles." Scott-Pontzer, 85 Ohio St.3d at 664. Because Marjorie Chidester is an insured

under the policy and because the policy provides underinsured motorist coverage for insureds, she is entitled to such coverage. This Court finds nothing to support a different conclusion simply because the entity that purchased the insurance policy was a school board. To the contrary, in a different case involving Wausau and Logan Elm School District, the Pickaway County Court of Common Pleas followed Scott-Pontzer and held Wausau liable for coverage based upon an accident which occurred outside the scope of employment while the employee's spouse was driving the family car. See Congrove v. Wausau Insurance Cos., Case No. 2000-CI-006 (4th Dist., October 2, 2000).

In sum, applying the Ohio Supreme Court's decision in Scott-Pontzer to the facts of this case, the Court **GRANTS** Marjorie Chidester's motion for partial summary judgment and **DENIES** Wausau's motion for summary judgment. Marjorie Chidester is an insured under the Wausau policy and is entitled to underinsured motorist coverage as provided therein. However, the following issues remain in this case: Chidester's bad faith counterclaim, the proceeds to which she is entitled under the

policy, and whether she is entitled to any other interest, fees or costs.

IT IS SO ORDERED.

Joseph P. Kinneally

UNITED STATES DISTRICT JUDGE